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No. 95-488

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALASKA AIRLINES, INC., AMERICAN AIRLINES, INC.
DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC.
and UNITED AIR LINES, INC.
Petitioners,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE,
HENRY J. VOSS, as Director of the California
Department of Food and Agriculture,
and STATE OF CALIFORNIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is California's agricultural pest inspection fee, imposed on certain airline flights originating outside the United States, prohibited by the Anti-Head Tax Act, as codified at 49 U.S.C. section 40116b(b) (formerly 49 U.S.C. section 1513)?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement in their Petition for a Writ of Certiorari.

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v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, HENRY J. VOSS, as Director of the California Department of Food and Agriculture, and STATE OF CALIFORNIA,

Respondents.

OPINION OR JUDGMENT BELOW

Pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement in their petition for a writ of certiorari.

STATEMENT OF JURISDICTION

Petitioners' basis for invoking the jurisdiction of this Honorable Court is set forth in their petition for a writ of certiorari.

STATUTORY PROVISIONS

Pursuant to Supreme Court Rule 24.2, respondents incorporate petitioners' statement in their petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners' statement of the case, set forth in their petition for a writ of certiorari, is substantially correct. Therefore, pursuant to Supreme Court Rule 24.2, respondents accept petitioners' statement of the case except as modified or corrected herein.

First, respondents disagree that the fees collected cannot be considered for the use of airport facilities. The inspections, which the fees fund, are conducted at airports in areas established by the United States Department of Agriculture. Just like gates, concessions, and baggage systems, agricultural inspections are part of airport functions. The record discloses, however, that the nature of the use of airport facilities remain a material difference of fact between the parties to be resolved at subsequent trial. This Court should note, as correctly pointed out by petitioner, that the relief granted petitioners by the trial court was pursuant to a motion for summary judgment filed by petitioners. Under California Code of Civil Procedure section 437c, summary judgment motions are granted without trial, and upon a showing of "no material differences of fact" in contention. On this issue and many other issues, petitioners and respondents disagree as to whether material differences of fact exist.

Secondly, respondents also contend that there is a triable issue as to whether they can be considered operators of the airport facilities.

Thirdly, the inspections, which the State fee funds, are conducted jointly by the respondents and the United States Department of Agriculture. That federal agency has noted the positive impact of the State program.

Fourthly, the State of California has reduced the agricultural pest inspection fee challenged here to $43, per flight. Also, individual airlines may apply for exemptions.

SUMMARY OF ARGUMENT

The Anti-Head Tax Act has a limited reach, as is apparent both from Congress' intent and the language of the statute. It prohibits only state taxes on passengers, on the sale of air transportation, and on gross receipts. The state charge challenged here is on the entry of flights from certain foreign countries, for the purpose of funding agricultural pest inspections. This function does not come within the reach of the Anti-Head Tax Act. This interpretation, by the California Court of Appeals, is consistent with other court decisions, including the opinions of this Honorable Court.

Additionally, numerous issues in this case would prevent the Court from reaching this core issue. These other issues include petitioners' failure to raise issues before the state courts, the existence of triable issues of fact, and the question of the existence of a private right of action.

All these reasons dictate that this Honorable Court deny petitioners' petition for a writ of certiorari.

ARGUMENT

Having been denied review by the California Supreme Court, petitioners now turn to this Honorable Court to decide a simple question of statutory interpretation. This question, however, has been succinctly and appropriately answered by the California Court of Appeals. *See Alaska Airlines, Inc. v. Department of Food & Agric.*, 33 Cal.App.4th 506 (1995) (reprinted at Pet.App. pp. A-2 to A-15). And despite petitioners' pleas to the contrary, the California Court of Appeals answered the pertinent question in a manner consistent with cases decided by this Honorable Court and all other courts addressing the federal Anti-Head Tax Act.

In their petition for a writ of certiorari, petitioners invoke an interpretation of the Anti-Head Tax Act which has been previously raised by the airline industry -- that the Act is plenary in nature, that it prevents almost every general governmental charge for services provided, and that, therefore, any finding by any Court that the Act is narrow in scope, must be challenged by the airline industry. Petitioners also, without reference to the record, assert that the impact of this minor fee disrupts their ability to compete, invites overzealous State taxation spreading across the nation, and could result in possible foreign retaliation. Of course, there is no evidence of either foreign retaliation or other State fees comparable to California. And petitioners also fail to advise the Court that there is contested evidence concerning the actual financial impact of this modest fee upon the overall operations of these major domestic corporations.[1/]

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1. Petitioner submitted self-serving declarations from airline corporate officers, which merely concluded that the imposition of an $85 inspection fee (for which an inspection service is provided or

Petitioners have been required to pay $85 for each of their airplanes that enters into the State of California from a foreign country, in order to pay for increased agricultural inspections. Petitioners have not challenged the inspections themselves. In fact, the inspections are done jointly with the United States Department of Agriculture. The inspections advance the valuable goal of protecting California agriculture and thereby that of the United States. Such is why, no doubt, USDA entered into an agreement with California to perform the inspections, funded by the State fee. Petitioners have not challenged the reasonableness of the amount of the inspection fee. In fact, that fee has recently been reduced to reflect actual budget realities. (*See* Cal. Code Regs. tit. 3, § 3560 (a)). Individual airlines can apply for exemption if they make the required showing. (*See id.*)

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offered) would be "passed-on" to passengers. However, no documentary evidence was provided of any such "pass-through" and as will be noted herein, an increase in the general operating expense of the airline is not tantamount to a "head tax" within the narrow meaning of the Act in question.

I.

THE CALIFORNIA COURT OF APPEAL CORRECTLY DECIDED THAT THE FEDERAL ANTI-HEAD TAX ACT DOES NOT PROHIBIT CALIFORNIA FROM IMPOSING THIS AGRICULTURAL INSPECTION FEE

The basic difference between the arguments advanced by petitioners and those advanced by respondents is a difference in interpretation of former 49 U.S.C. section 1513.[2] This federal act is correctly entitled the "Anti-*Head* Tax Act." This Act was promulgated by Congress for a narrow and specific purpose: to eliminate state "head" (per passenger) taxes and state gross receipts taxes on airlines. However, petitioners' view the act in question as an "Anti-*Tax* Act." They ignore the limited purpose of the Act, and they ignore the specific federal statutory language. They also ignore numerous authority interpreting the Act in a manner consistent with the California Court of Appeal's opinion.

As petitioners correctly note, this Act was the direct result of this Court's 1972 decision, *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). This decision, which held that state and local governments were not preempted from imposing *any* tax or fee on air transportation, resulted in a flurry of congressional action and led to the passage of 49 U.S.C. section 1513. It is instructive to review the exact language as passed by Congress. Section 1513 states:

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2. While this matter was pending on appeal, Congress recodified this section. It now appears at 49 U.S.C. § 40116. Respondents follow petitioners' suggestion, and use the former designation.

> "(a) No state . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . .
>
> "(b) Nothing in this section shall prohibit a state . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sale or use taxes on the sale of goods or services . . . and nothing in this section shall prohibit a state . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

On its face, section 1513 preempts a limited and enumerated number of state *charges*, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. Section 1513(b), in turn, expresses Congress' view that the states are free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a) . . . including . . . property taxes, net income taxes, and franchise taxes" among others.[3/]

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3. In subsection (b), Congress utilized a term "including" in the operative language. It is a well-established rule of statutory interpretation that the words "include" and "including" are not ordinarily words of limitation, but words of enlargement. (*Federal Land Bank v. Bizmarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *Chemehveri Indian Tribe v. California St. Bd. of Equalization*, 757 F.2d 1047, 1054 (9th Cir. 1985)). Thus the list is hardly exhaustive as the petitioners have argued below.

The clearly stated legislative intent and purpose of this federal act was to prevent local "head" taxes on airline passengers and preempt state taxes on the gross receipts of airlines. *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n.6, 13 (1983). As Senator Cannon, one of the sponsors of the bill, stated in part:

> "Finally, Mr. President, S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges, *either on passengers, or on the carriage of such passengers in interstate commerce*."

119 Cong. Rec. 3349 (1973) (emphasis added). The California Court of Appeal opinion correctly noted that, "Congress did not intend to prohibit all State taxes or charges on air carriers" but rather, "'the prohibition was intended to apply only to 'head taxes' and the like.'" 33 Cal.App.4th, at 512-13 (quoting *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 16 (1986) (Burger, J. concurring)).

The challenged state fee is imposed on "[e]ach air carrier or foreign air carrier engaged in foreign air commerce which carries animals or plants or other materials which are, or are likely to be, infected or infested with any pest . . . upon the initial landing in this state of each flight of the carrier which originates outside the United States." (Cal. Food & Agric. Code § 5353(c)). To rule that this inspection fee is a "head tax" would be a misinterpretation of the Act. The state inspection fee cannot be considered a charge on (1) persons traveling in air commerce, (2) on the carriage of persons traveling in air commerce, (3) on the sale of air

transportation, or (4) on the gross receipts derived therefrom. The state charge in question is for the use of existing airport facilities, and specifically for inspection services performed on the airlines.[4] It is not imposed on passengers. It is not a tax or charge based upon the amount of money earned by a given airline. This fixed charge is set by statute or regulation, and does not vary depending upon the number of passengers, amount of freight, or gross receipts. All that matters is that an aircraft arriving from specified foreign countries and entries with commodities which might be infested with foreign pests triggers the charge.[5] Such clearly does not meet the purpose of the Anti-Head Tax Act, under any theory. Nor does it fit within the specific statutory prohibition of the federal act.

Section 1513 cannot be interpreted as broadly as the respondents suggest. Congress did not preempt States from regulating airlines and their operations. As this Honorable Court has succinctly stated, the Federal Aviation Act, of which section 1513 is only a part, is not plenary in nature and, therefore, does not exempt the ability of States to regulate air travel. In *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1985), this Court held that, "rather than prohibit state regulation in the area, Congress invited it. This is not the stuff of preemption."

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4. The Court should note that obviously the inspections take place at airports. Because the fee does not fall within the prohibitions of 49 U.S.C. section 1513, it is not necessary for the respondent to establish that the fee is actually for the "use" of airport facilities per se.

5. The sole attack on the constitutionality of the State Act is vested upon the federal Anti-Head Tax. No constitutional charge of burden of foreign commerce, discrimination or other allegation has been made in the instant record.

There have been numerous cases in which courts have interpreted section 1513(a) not to apply to fees which do not involve taxes on passengers, in situations very similar to the one at bar. (*See Alamo Rent-a-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 n.1 (9th Cir. 1991) (ground transportation costs not subject to § 1513(a)); *Travel Services, Inc. v. Government of the Virgin Islands*, 904 F.2d 186, 188-89 (3rd Cir. 1990), *cert. denied*, 498 U.S. 939 (tax on travel agents not an indirect levy prohibited by § 1513(a)); *City and County of Denver v. Continental Air Lines, Inc.*, 712 F.Supp. 834, 838-39 (D. Colo. 1989) (airport concession revenues not subject to § 1513(a)); *Island Aviation, Inc. v. Guam Airport Auth.*, 562 F.Supp. 951, 957-59 (D. Guam 1982) (assessments against airline for departure lounge costs not violative of § 1513(a)).)

For these reasons, the California Court of Appeal opinion is neither novel nor does it stray from established statutory interpretation principles. It is consistent with other cases interpreting this federal act.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Attempting to attract this Court's scrutiny, petitioners contend that the California Court of Appeal's decision conflicts with this Court's opinions in *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983) and *Northwest Airlines, Inc.* v. *County of Kent, Michigan*, 510 U.S. ____, 114 S.Ct. 855 (1994). Even a cursory reading of this Court's opinions reveals that these cases involve distinct issues.

In *Aloha Airlines*, this Court reviewed a Hawaii Supreme Court decision upholding a state statute imposing a tax on the gross income of airlines operating within the State. This was a gross receipts tax, which this Court understandably found expressly preempted by the Anti-Head Tax Act; after all, section 1513(a) prohibits taxes on "gross receipts" from the sale of air transportation."

In *Northwest Airlines*, this Court affirmed a decision of the Sixth Circuit. Before the Court was a challenge to the allocation of costs (as user fees) to commercial aviation, general aviation, and nonaeronautical concessionaires. The legal and factual question was whether the airport's accounting was reasonable, as required by 49 U.S.C. section 1513(b). This Court held that the Act must be interpreted as a whole but that the allocation of fees, unless clearly excessive, was left to the judgment of those assessing the fees.

Indeed, petitioners' interpretation of section 1513 is at odds with this Court's decision in *Northwest*. Petitioners argue that unless a specific tax or fee is listed as an exception in section 1513(b), the tax or fee violates

section 1513(a). This interpretation badly misconstrues both the facial meaning of the Anti-Head Tax statute as well as the legislative intent behind it. Section 1513(b) is an enumerated list of exceptions to section 1513(a). However, if a tax, fee or charge *does not fall within the restrictions of section 1513(a),* then section 1513(b) has no application. Respondents assert, as the California Court of Appeal correctly found, that the fees charged by the California Department of Food and Agriculture for limited inspections of certain flights originating from foreign countries, and carrying commodities which may contain pests not found in the United States, simply do not fall within those charges restricted by section 1513(a). Thus, under the clear language of this Court in *Northwest*, reading the statute as a whole, the California Court of Appeal was correct in its interpretation and petitioners myopic focus on *only* section 1513(b) is misapplied.

Neither *Aloha Airlines* nor *Northwest* addresses the exact questions answered by the California Court of Appeal in this case. This case posits an entirely different question, answered by the language and legislative history of the Anti-Head Tax Act: can a state impose a fee, collected solely to fund agricultural pest inspections, on the *entry* of planes from foreign counties. This question the California Court of Appeal answered correctly and consistent with this Court's opinions.

There is insufficient evidence of "pass through" in any event. Petitioners cite no record reference to their allegations that the State Act charges are passed on to paying passengers. As mentioned in note 1, *supra*, the sole basis below for this contention was a series of conclusionary declarations from airline executives that the State inspection fee had been "passed through" to fare-paying passengers. But no extrinsic evidence was

presented and respondents contested this self-serving "evidence."

In any event, operating expenses, such as herein, even if "passed through" to passengers as increased costs, do not violate the Anti-Heat Tax Act. (*New England Legal Foundation v. Mass. Port Authority*, 883 F.2d 187 (1st Cir., 1989).

III.

THE RECORD IN THIS CASE IS NOT SUFFICIENT TO AFFORD THIS COURT COMPLETE REVIEW OF THE QUESTIONS PRESENTED.

Even if this Honorable Court were to conclude that this case presents important questions meriting this Court's review, the status of the record in this case and its procedural history presents problems for that review.

Because of these difficulties as well as others, it would be far better for the matter to be remanded to the trial court for a completion of any proceedings (including possible amendment of the complaint and the additional of new claims concerning the Act's constitutionality by petitioners should they desire) and resolution of the matter with the complete record. This could then be presented to the Court, if appropriate, for review.

The federal Anti-Head Tax Act, on its face, prohibits four types of fees or taxes: (1) on persons traveling in air commerce, (2) on the carriage of persons traveling in air commerce, (3) on the sale of air transportation, or (4) on the gross receipts derived therefrom. In their petition for a writ of certiorari, petitioners ask this Court to decide whether the fee in question is on the sale of air transportation. Yet, this question was not briefed in the lower court. (*See* Clerk's Transcript pp. 378-80.) Nor did the trial court reach the issue. (*See* Petition Appendix pp. A-42 to A-54.) This was acknowledged and noted by the California Court of Appeal. (33 Cal.App.4th, at 511 n.4.) Petitioners can not now, without prior argument and without a factual record, raise this question before this Honorable Court.

The order reversed by the Court of Appeal was the granting of a motion for summary judgment. And

while the trial court and the Court of Appeals held that there existed no triable issue of fact, respondents have argued, and will argue before this Honorable Court, that such issues exist on this record. These issues include whether the State operates any of the airports in question, whether these charges are for the use of airport facilities, and whether the fees are passed on to the passengers. As to this last point, at least one circuit has found this point significant. (*See New England Legal Found. v. Massachusetts Port Auth.*, *supra*, 883 F.2d 157, 170.)

Lastly, there is the issue, sidestepped by the California Court of Appeals, as to whether petitioners may pursue a private cause of action. At least one court has ruled that there is no private right of action under the Anti-Head Tax Act. (*See Air Transport Ass'n of Am. v. City of Los Angeles*, 844 F.Supp 550, 552-55 (C.D. Cal. 1994).)

CONCLUSION

The Court of Appeal decision is correct, restrained and properly reconciles federal and state law. It raises no constitutional questions and is fully consistent with the body of federal law interpreting the federal Act. It does not warrant this Honorable Court's attention. Respondents respectfully request that this Honorable Court deny petitioners' petition for a writ of certiorari.

Dated: October 18, 1995.

Respectfully submitted,

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